

Bid Protests and GAO Role

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Protest Forums

- GAO
- Court of Federal Claims
- Contracting agencies

What are differences in the forums?

Advantages and disadvantages of each forum?

Choice of Forums

- GAO, COFC and contracting agency
- Cost to pursue
- GAO--stay automatic if procedures followed; COFC--seek injunction; agency stay process **COFC review overrides**
- GAO may recommend the agency pay the protester's costs of pursuing protests and, in appropriate cases, bid/proposal preparation costs
- Success rate
- Expertise/Predictability (Substantive law applied--are there differences?)
- Jurisdictional differences
- Need an attorney?

Overview of GAO Bid Protest System

Historical Background

- GAO has been deciding protests since 1925--unlike other GAO work, protest work triggered by complaint from companies
- In 1967, GAO issued first bid protest procedures establishing more formal protest process
- 1984--GAO given explicit statutory authority to decide protests in CICA
- Established time period for resolving protests--90 working days
- “Automatic stay”
- GAO could determine (recommend) entitlement of costs if protester prevailed
- CICA affirmed the importance of GAO as an informal, inexpensive, and expeditious forum

Historical Background

- 1987-1991--process that culminated in regulations providing for hearings and document discovery pursuant to protective orders
- 1994--FASA promotes debriefings prior to protests and provides explicit statutory authority for protective orders
- 1995--Clinger-Cohen Act shortens decision deadline to 100 calendar days

World Trade Organization

- Signatories to the Agreement on Government Procurement must put in place domestic procedures by which aggrieved private bidders can challenge procurement decisions
- Many countries are looking at GAO model

Bid Protest Process--the Basics

- In deciding bid protests, GAO considers whether federal agencies have complied with statutes and regulations controlling government procurements
- 1400 protests filed annually
- The bid protest process at GAO begins with the filing of a written protest

Parties Involved--The Players

WHO MAY PROTEST

- By law, a GAO protest can only be filed by an "interested party," which means an actual or prospective bidder or offeror with a direct economic interest in the procurement. In challenges of the evaluation of proposals and the award of contracts, this generally means an offeror that would potentially be in line for award if the protest were sustained.
- ATO in A-76 Competition by Law
- Duefrene case
- Proposed Regs
- Prejudice vs "IP"

Intervenor

- Immediately after receiving notice of the protest from GAO, the contracting agency must give notice of the protest to the contractor if an award has been made; if no award has been made, the agency must notify all bidders or offerors that have a substantial chance of receiving an award.
- GAO may permit other firms to participate in the protest as "intervenors." If the award has been made, GAO permits only the awardee to intervene. If the award has not been made, firms wishing to intervene should so advise GAO and the other parties, and then contact GAO to learn whether they will be permitted to intervene.

Agency

- The contracting agency participates primarily by responding to the protest allegations in a report and at a hearing, if required.
- Within 1 day of receipt of the protest, GAO will telephone the contracting agency to advise it that a protest has been filed. 4 C.F.R. § 21.3(a). That telephone call is important because it is the official notice that may trigger a statutory stay of the award or performance of a contract pending GAO's decision. The call also triggers the agency report requirement.

Debriefings

- By statute, if procedures followed, can file protest timely after debriefing and obtain stay of contract performance

Evaluation of Grounds of Protest

- Must fall within the jurisdictional boundaries of GAO's bid protest authority
- Must demonstrate violation of a federal procurement statute or regulation

Where GAO Has No Jurisdiction

- Protests of procurements by agencies that do not meet statutory definition of “federal agency;” protests of procurements conducted by agencies such as the U.S. Postal Service, the Federal Deposit Insurance Corporation, and **nonappropriated fund activities**.
- Contract administration issues
- Certain Small Business Administration issues
- Subcontract protests
- Suspensions and debarments
- UNICOR
- Randolph Sheppard Act
- Responsibility
- IDIQ/ Out-of-Scope

Protests Must Be Timely

- The regulations set forth the timeliness requirements for filing protests at GAO. Because bid protests may delay the procurement of needed goods and services, GAO, except under limited circumstances, strictly enforces these timeliness requirements.

Challenges to the Solicitation

- Basic rule: Protests alleging improprieties in a solicitation must be filed before bid opening or the time set for receipt of initial proposals if the improprieties were apparent prior to that time.

Ten Day Timeliness Rule

- In all other cases, protests must be filed not later than **10 days** after the protester knew or should have known the basis of protest (whichever is earlier), with **the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing** is "requested and, when requested, is required" (that is, a debriefing that is required by law).
- In these cases, with respect to any protest basis that was known or should have been known before the statutorily required debriefing, the protester **should not file its initial protest before the debriefing** date offered to the protester, but must file its initial protest not later than 10 days after the date on which the debriefing was held.
- CBMC Decision-B-295586--Time measured from FedBizOpps notice.

Appealing Agency-Level Protests

- Special timeliness rules govern protests initially filed with the contracting agency. In those cases, the protest to GAO must be filed not later than 10 days after the protester learned of "initial adverse agency action."

Timeliness Exceptions

- GAO may consider an untimely protest where exceptional circumstances beyond the protester's control caused the delay in filing the protest, or where the protest presents novel or significant issues of interest to the procurement community. **GAO invokes these exceptions sparingly.**

Initial Intake of Protest

- Protests may be filed by hand delivery, mail, commercial carrier, fax, or e-mail to Procurement Law Control Group (PLCG)
- PLCG is supervised by an Assistant General Counsel and operated by support staff trained to process the filings in accordance with our regulations
- PLCG assigns B-number case identifier
- PLCG reviews to ensure protest meets threshold filing requirements-timeliness and jurisdiction
- Within 1 day of receipt of the protest, PLCG will telephone the contracting agency to advise it that a protest has been filed (this call triggers the stay)
- If case not dismissed, assigned to group and attorney
- PL organized into 4 groups of attorneys, each managed by an Assistant General Counsel

Intake Continued

- If protest is summarily dismissed, a notice of dismissal will be furnished to the parties
- Otherwise, GAO will send the protester a written notice acknowledging receipt of the protest; in appropriate cases, GAO may issue a protective order package, a hearing schedule, and/or a status conference notice simultaneously with the acknowledgment notice
- GAO follows up the telephone notice with a written confirmation of the report requirement that includes essentially the same information provided to the protester in the acknowledgment notice

Status Conference

- To facilitate the expeditious development and resolution of a protest, **GAO will conduct status and other types of informal conferences, by telephone or in person, with all parties participating in a protest.**
- Such conferences may be **held at any time** during the bid protest process .
- For example, status and other types of informal conferences are beneficial for **resolving protective order admission objections, document disputes, and summary dismissal requests; for discussing issues related to hearings; and for obtaining answers to questions that are relevant and material to the disposition of a protest.**

Protective Orders

- If the record in a protest contains "protected" information, that is, a **company's proprietary or confidential data or the agency's source-selection-sensitive information**, GAO may issue a **protective order**.
- The protective order **strictly controls who has access** to protected material and how that material is labeled, distributed, stored, and disposed of at the conclusion of the protest.
- **Where a protective order is in place for a protest, parties may file documents by e-mail** only if authorized by, and only in accordance with procedures specifically established by, GAO.
- Only individuals, **attorneys or consultants retained by attorneys**, who apply to GAO, and whose applications are approved by GAO, will be permitted access to protected information.

Protective Orders Continued

- Applicants need to show that they are **not involved in competitive decision making and that there will be no significant risk of inadvertent disclosure of such information.**
- Individuals permitted access to protected information are not allowed to disclose that information to others.
- Because the information released under a protective order is not GAO's, **GAO relies on the parties to carefully review applications for access to material under a protective order (and to call to GAO's attention any possible violation of a protective order).**
- **Any violation of the terms of a protective order may result in the imposition of such sanctions as GAO deems appropriate,**

Report from Agency

- Within **30 days** after an agency receives telephonic notice of a protest from GAO, the agency is required to provide GAO, the protester, and any intervenors a **complete written report responding to the protest, including all relevant documents, or portions of documents, and an explanation of the agency's position.**
- The report generally includes a statement of the relevant facts signed by the contracting officer, a memorandum of law explaining the agency's position, and a list and copies of all relevant documents.

Hearings

- At the request of a party, or on its own initiative, **GAO may conduct a hearing** in person or by telephone where it concludes that the protest cannot be resolved on the written record alone.
- Since hearings increase the costs and burdens of protests, GAO holds hearings sparingly (56 last year).
- Criteria-tech/factual issue and procurement cost.

Prehearing Conference

- Prior to hearing, GAO will generally conduct a pre-hearing conference with all parties.
- The purpose of that conference is to review the scope of the hearing, identify the appropriate witnesses and their availability, establish the date and location of the hearing, and discuss other logistical matters.

Hearings

- The GAO attorney handling the case conducts the hearing
- The hearings range from informal “roundtable” discussions to trial-like proceedings with witnesses subject to direct and cross examination
- Hearings are recorded or a court reporter is used
- Each hearing examiner has his/her own style
- Video

Opportunity for Parties to file Comments on Report and/or Hearing

- Closes the record

Alternative Dispute Resolution

- GAO may use ADR procedures at the request of one or more of the parties, or where GAO deems ADR to be appropriate.
- **Negotiation assistance**--either before or after a protest is filed.
- **Outcome prediction**--GAO advises the parties of the likely outcome of the protest in order to allow the party likely to be unsuccessful to take appropriate action to resolve the protest without a written decision.
- **ADR Success Rate 90 percent**
- **Resolves Cases Sooner**
- **Agency Flexibility in Remedy**

Decision Timetable

- Once the record is complete, GAO will consider the protest and decide the case through a written decision issued by the Comptroller General. At the latest, the decision will be issued 100 days after the protest is filed.

Decisions

- GAO will either dismiss, deny, or sustain a protest.
- GAO generally sustains protests where it determines that the contracting agency violated procurement statutes or regulations, unless it concludes that the violation did not prejudice the protester.

Recommendations if Protest is Sustained

- Where a protest is sustained, GAO will recommend appropriate corrective action such as reevaluation and termination of the improperly awarded contract.
- If the protest is sustained, GAO generally will recommend that the protester be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees. Where there is no other relief available, GAO will recommend that the protester also be reimbursed the costs of preparing its bid or proposal.
- GAO recommendations are not binding, but they are followed more than 95 percent of the time. If not, GAO reports the agency to Congress.

Bid Protest Statistics for Fiscal Year 2004

	FY 2004	FY 2003	FY 2002	FY 2001	FY 2000	FY 1999
Cases Filed	1,485 (up 10%)	1,352 (up 12%)	1,204 (up 5%)	1,146 (down 6%)	1,220 (down 13%)	1,399 (down 11%)
Cases Closed	1,405	1,244	1,133	1,098	1,275	1,446
Merit (Sustain + Deny) Decisions	365 (80 days)	290 (79 days)	256 (79 days)	311 (79 days)	306 (86 days)	347 (88 days)
Number of Sustains	75	50	41	66	63	74
Sustain Rate	21%	17%	16%	21%	21%	21%
Effectiveness Rate (reported)	34%	33%	33%	33%	29%	29%
ADR (cases used)	123	120	145	150	144	88
ADR Success Rate	91%	92%	84%	84%	81%	92%
Hearings	9% (56 cases)	13% (74 cases)	5% (23 cases)	12% (63 cases)	9% (54 cases)	9% (53 cases)

PROTEST OVERVIEW—First ¼ of FY 2005

	1/4 Fiscal Year 2005	1/4 Fiscal Year 2004	1/4 Fiscal Year 2003	1/4 Fiscal Year 2002	1/4 Fiscal Year 2001	1/4 Fiscal Year 2000
Protests Filed	366 (down 4%)	383 (up 16%)	329 (up 33%)	247 (down 12%)	281 (down 17%)	339 (down 15%)
Cases Closed (includes recons and costs)	411 (up 4%)	397 (up 12%)	354 (up 21%)	292 (down 2%)	287 (down 25%)	385 (down 9%)
Protests Closed (only protests)	376 (up 1%)	371 (up 12%)	330 (up 25%)	265 (no change)	266 (down 25%)	357 (down 8%)
Decisions Issued (sustain/de ny)	78 (avg. days = 79)	106 (avg. days = 80)	86 (avg. days = 79)	70 (avg. days = 75)	79 (avg. days = 78)	95 (avg. days = 83)
Sustain Rate	24%	20% (21 of 106)	19%	19% (13 of 70)	14% (11 of 79)	17% (16 of 95)

Substantive Issues at GAO

**Conflict of Interest--SAIC,
Purvis, Druyun Cases**

**FSS Buys--KEI Pearson
Case**

**Corrective Action
Protests--Saltwater Case**

**Simplified Acquisitions--
Information Ventures Cases**

Wrap-up
